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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 214

GEORGE MASTROS, *Petitioner*,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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GEORGE MASTROS, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case of July 3, 1958.

OPINION BELOW

The opinion in the court below (Appendix A, *infra,* p. A1) has not yet been reported.

JURISDICTION

The judgment of the court below (Appendix B, *infra,* p. A2) was entered on July 3, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a conviction under 18 U.S.C. § 287 for making a false claim can be sustained where there is no evidence that engineering services in the amount set forth in the document in question — the only allegedly false item involved — were not actually performed.

2. Whether a conviction under 18 U.S.C. § 287 for making a false claim can be sustained which alleges that "the total amount due and owing * * * on said settlement claim was substantially less than the amount claimed," where the proof shows that the Government later paid a larger aggregate amount to the claimant on the same contract, and does not question that larger amount.

3. Whether an interim settlement proposal that is subject to change upward or downward constitutes a claim within 18 U.S.C. § 287.

STATUTES INVOLVED

1. Section 287 of Title 18, United States Code, provides as follows:

> **"§ 287. False, fictitious or fraudulent claims**
>
> "Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

2. Section 1001 of Title 18, United States Code, provides as follows:

> **"§ 1001. Statements or entries generally**
>
> "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

STATEMENT

Petitioner was indicted on two counts, the first count (2a) charging him with making and causing to be presented for payment and approval a false claim against the United States on behalf of Espey Manufacturing Company, Inc., in the sum of $1,128,875.81, the alleged falsity being that the total amount due the company was substantially less, this in violation of 18 U.S.C. § 287. The second count, alleging the making of a false statement in violation of 18 U.S.C. § 1001, was dismissed by the District Court at the close of the testimony (1a, 312a, 313a).

Petitioner was found guilty on Count 1 after a five day trial (1a, 327a). Three days later, on April 16, 1956, petitioner filed a renewed motion for judgment of acquittal or in the alternative for a new trial (1a, 331a-332a).

This motion was denied on January 9, 1958, more than twenty months later (1a, 333a-343a). Petitioner

was sentenced to 30 days confinement, which was suspended; to pay a fine of $500; and he was placed on probation for two years (1a, 343a). On appeal, the court below affirmed, holding that the evidence was sufficient, and that the document presented constituted a claim within the statute (Appendix A, *infra*, p. A1).

A. The Basic Contract; Hardship Claim Based Thereon.

The alleged false claim here in issue arose out of a contract signed by Espey Manufacturing Company more than two years before petitioner entered their employ, and was submitted on behalf of and for the benefit of that corporation over the signature, except as to accounting data, of Sol Pinsley, a Vice-President (GX8, 34a-36a, 75a). Espey Manufacturing Company was not indicted; neither Sol Pinsley, the Vice-President, nor Nathan Pinsley, the President, was indicted; each claimed his privilege (42a, 181a, 182a), Nathan Pinsley doing so when called as a witness in this case (154a-155a). Petitioner, who did not and could not receive any personal benefit from the claim (22a, 136a-137a, 145a), and who talked freely to the F.B.I. (157a-158a, 255a) and to the Grand Jury (181a, 255a), is the only individual against whom the Government took action. As will be pointed out below, the amount ultimately paid Espey Manufacturing Company by the Government on the contract in question was more than was claimed in the document prepared by petitioner and in respect of which he was indicted and convicted.

But to particularize:

On June 16, 1950, the Signal Corps of the United States Army awarded to Espey Manufacturing Company (hereinafter called simply Espey) a contract to

manufacture 17,000 pieces of electronic equipment—complicated equipment for radio communication to and from Army tanks (4a-5a)—at the fixed price of $2,752,422.75 (GX1, 3a-5a). This contract was carried as Job No. 381 on Espey's books (7a, 46a, 47a, 48a).

On February 25, 1952, Espey submitted to the Government, under Title II of the First War Powers Act of 1941, as amended, a hardship claim, seeking reimbursement for losses incurred or estimated to be incurred on that contract (GX2, 6a). Supporting this hardship claim, Espey filed schedules, dated February 21, 1952 and revised August 15, 1952, of its costs incurred to that date and costs estimated to be incurred in order to complete its contract (GX3, 6a-7a). In this schedule, Espey listed total costs of $26,000 on Job 381 as of August 15, 1952 (7a). During March 1952, prior to its revision, this schedule had been audited by one Falchuk of the Army Auditing Agency, who testified that according to his work sheets $919.59 had been spent for direct engineering labor from the inception of the contract through the end of 1951 (49a).

The schedule had been prepared before petitioner was employed by Espey as its controller, beginning in July 1952 (177a, 228a).

A hearing on Espey's hardship claim was held by the Army Contract Adjustment Board in the Pentagon on September 5, 1952 (6a): the proceedings at that hearing constitute Exhibit D-1. Petitioner was invited to, and did, attend the hearing (239a-240a).

At the hearing, it was established that, in connection with Espey's contract, models prepared by Federal Telephone Co. and submitted to Espey had

been rejected by the Signal Corps, and that Espey in consequence had been required to redesign the equipment (23a-24a, 26a).

The record of the hearing contains considerable testimony showing that engineering redesign was necessary before Espey could get into production on the contract (24a, 26a, 27a, 28a, 29a).

At the hearing, Morris Pinsley, Espey's attorney (25a), said, among other things (27a, 30a):

> "We went through the trouble of going ahead and building this thing and giving it to the laboratories where at the present time it is approved, and up to this time we haven't put in any charges to the Government for this development and engineering, but it was done just the same."
>
> * * * * *
>
> "We have well over $400,000 in case [cash?] invested in the job, not including the engineering time which we had to put in in order to get the thing to a position where we accomplished the job without the Government's drawings."

On the basis of the estimated costs projected from the $26,000 figure in the revised schedule, the Board's decision authorized the making of a new contract with Espey, whereby the original authorization was increased by $600,000 (GX4, 8a, 25a).

B. The Termination Proposals.

On February 19, 1953, acting in accordance with the terms of the contract with Espey, the Signal Corps terminated that contract for the convenience of the Government (39a, 51a, 113a). Accordingly, Espey prepared its termination settlement proposal. As

explained by the Government's witness Moore (Tr. 18):*

> "Under most of the Government contracts having a contract consideration in excess of one thousand dollars the Government has incorporated in that contract an article designated Termination for the convenience of the Government, and the purpose of that article is to stop expense from occurring after it is determined that the need for this equipment is no longer necessary. Under the article the contractor is required to submit a termination claim or termination settlement proposal. In that proposal he itemizes the various elements of cost that make up the moneys alleged by him to have been spent. In this case it is direct material, direct labor, factory burden and general administrative expense and engineering expense—anything that represents costs incurred in the performance of this particular contract."

Espey submitted three successive settlement proposals, the first on March 31, 1953 (GX6), the second on June 2, 1953 (GX7), and the third on July 31, 1953 (GX8). All three were submitted by petitioner as Espey's controller (13a).

In those proposals, the engineering costs were given as $182,005.74, a total that was broken down as follows in the third proposal (20a):

Material	$ 9,098.86
Labor	$80,096.84
Overhead	$92,810.04

In an earlier document signed by petitioner (GX5), labor costs on the contract, as of December 31, 1952,

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* References marked "Tr." are to the unprinted transcript of testimony.

were shown as $3,882.02 (11a). In the hardship claim, the engineering labor had been stated as $2,314.92 (56a, 68a).

Finally, on February 16, 1954, Espey over petitioner's signature submitted a revised statement of its settlement proposal as of March 31, 1953 (GX9, 17a-19a), which set forth $2,314.92 for engineering labor (15a), but was higher in the aggregate than any of the earlier proposals by some $200,000 (33a, 42a, 139a-140a, 255a).

C. Method of Preparing the Termination Proposals.

Petitioner, who had heard at the hardship claim hearing of the engineering problems arising from the submission of defective models to Espey (188a, 239a-240a), and who knew from his prior experience with another company and from other Espey contracts that engineering costs generally averaged from 2% to 3½% of the contract price (158a, 161a, 167a, 241a, 267a-268a, 276a), was convinced that the engineering costs originally shown on Job 381 were so far out of line as to be ridiculously low (239a, 240a). Petitioner expressed these views to Petker of the Espey organization, who estimated that at least $60,000 in engineering costs had been spent on the project (242a).

At the time petitioner was employed by Espey, he found that its records were being haphazardly kept (229a-231a), in particular that the payroll cards were neither filled in nor signed by the engineers (231a). Accordingly, in order to make the engineering costs on Job No. 381 more closely approximate what he believed was the fact, and to correct what he considered to be a sizeable error (300a), he instructed the cost clerks to make changes on the payroll time cards (114a,

158a-163a, 242a-244a) so that about 2 per cent of the total sales price would be charged as engineering costs (178a) under the designation Job No. 381E (57a, 59a; GX20), the "E" representing engineering (83a, 109a, 116a, 242a).

Petitioner testified that although the amount charged to 381E was an estimate, he considered it "a reasonable assumption based on the fact that the company's rate of engineering on contracts was at least 2 per cent" (276a-277a), and on the fact that "All the paper work concerned was wrong" (277a).

The changes effected on the payroll cards were openly made, in full view (77a), and the changed entries were all identified as 381E. Petitioner freely discussed the changes he was making with auditors for the Air Force (59a-60a), including one Grossman, who was disturbed at the discrepancy between the engineering costs stated in the hardship claim and those set forth in the settlement claim (79a, 81a, 111a, 114a-116a). Thereafter petitioner discussed the case freely with the F.B.I. (157a-172a), made a voluntary statement (157a-158a), and testified before the grand jury (181a) that indicted him.

Ultimately, Espey received on its fourth settlement proposal, which did not include the higher engineering costs (GX9), more from the Government (33a, 42a, 139a-140a, 255a) than it claimed under the third proposal (GX8) which included the allegedly fraudulent figure of $182,005.74 for engineering expenses.

D. Evidence of the Truth or Falsity of the Engineering Costs Contained in the Third Settlement Proposal.

Except insofar as the hardship claim (GX3) and the first, second, and fourth settlement proposals (GX6, GX7, GX9) listed total engineering labor at $2,314.92, no evidence was introduced by the Government to show that petitioner's estimate of $80,096.84 for direct engineering labor in the third settlement proposal (GX8) was false.

Moore admitted that he did not know whether the total of $180,000 for engineering was justified or not (40a). Falchuk did not know anything about the $180,000 claim nor whether there had been 50 engineers working there or not (Tr. 77). Weiss testified (69a-72a) that he was told in April of 1953, before the settlement proposal was filed on July 31, 1953, that "there was about $75,000 worth of additional engineering labor which was expended which was not included in the figures" originally mentioned; that "it was a contractor's policy not to distribute labor for pre-production payroll until production was initiated and it was not yet fully distributed at the time I was there"; that "there was a change being made increasing what had originally been on the books and on the time cards as allocated to this particular job for around $2300, that it was being raised to $75,000"; that "there would be about $75,000 additional engineering labor"; and that he, Weiss, did not know whether it should have been $75,000 or $750,000 or $3,000. Grossman similarly admitted that he did not know how much engineering work had been done (85a). Goldenberg testified that he did not know how much engineering time was spent on Job 381 (138a). Miller testified that he was not prepared to say that $80,000

worth of engineering had not been incurred on the job (179a).

While the Government did not undertake to establish the falsity of the $180,000 claim for engineering, petitioner was substantially restricted in his efforts that show that substantial engineering costs had actually been incurred by Espey.

Kuhn, general manager of Parts Producting Corporation, which was called in to build relays needed by Espey for its Job No. 381 (206a-208a), testified that he was familiar with Espey's work and particularly with Job 381 (208a-215a). He further testified (210a-211a):

> "Now, during this period I had many occasions to speak to Espey personnel, and they were telling me that they had nothing but engineering problems; they had to make trips to Fort Monmouth, they had to make trips to Federal, they had these engineering discussions, and they were building up a mammoth engineering cost, I thought, so that they could not possibly come out whole on the job, and I heard this morning some figures mentioned of $80,000. Anyway, it so happened that I did all the estimating and all of the bidding not only for Parts Production Corporation but also for the old Allen D. Cardwell Manufacturing Corporation, and I am fully conversant with costs, whether product costs or engineering costs, and with due respect to the opinions that have been advanced here I can tell you that $80,000 would not nearly cover the engineering charges on this job. It could not possibly.
>
> "Q. Why do you say that?
>
> "A. Unless it was charged to something else. Here is a contract, as I recall, that ran $3 million or more. It would have been simple if they had

a prototype which had been approved and able to work, drawings and manufacturing drawings which they could follow, and even then I know that you always have engineering problems, particularly when it comes to electronic equipment. There are always changes; there are always variations in materials you get. The temper of a piece of metal could be different. Engineers must be called in to see what changes must be made in manufacturing and technical procedures. So far as materials, they cannot say because two years ago we made it, we can make it that way now; there are refinements which you cannot well determine. Materials that come in must be carefully inspected so that they can be properly used to get the proper end result, and on a $3 million contract even if there were practically no engineering required, I do not think $80,000 would be too much."

Then:

"Q. Are you familiar—can you tell the Court and jury why $80,000 engineering is more fair or more relative to this project than $2000?

"A. Yes.

"Q. Do you know why?

"A. Yes.

"Q. Well, tell us."

At this juncture the following colloquy took place (216a-217a):

"The Court: No, I sustain the objection unless this witness can state precisely that $80,000, or the figures which are allegedly presented to the Government, that that amount was performed on this specific job. If he can show that, if he knows that—and I don't know how he can, I will permit it. If he can show these figures on that specific

job—and I would certainly want him qualified as to where he found the records to enable him to say that that much was expended—cannot represent his mere opinion, whether 3 to 5 per cent ought to have been charged. That is an opinion, and he may be a competent man, but it does not further us in the determination of whether that amount was expended on 381. It may well be, as this defendant allegedly is supposed to have said, that it ought to be 3 per cent, but that is not our problem: Our problem is whether this was falsified to the extent of some $70,000 on this particular job.

"Mr. Kossman [counsel for petitioner]: Yes.

"The Court: I don't care whether the work was actually done—maybe more was done—it would still be false even if it were within a penny of it.

"Mr. Kossman: Do you mean to say, Your Honor, if there was one cent missing that this would be a false claim.

"The Court: It may well be. It would only go in mitigation. If I steal a penny, I am guilty of larceny under proper circumstances, and I am just as guilty as though I stole half a million.

"Mr. Kossman: But the defendant is not charged with stealing anything.

"The Court: I was giving what I thought of as a parallel analogy; it might not be too parallel, but it doesn't make any difference. If this witness can show that $80,000 was expended on 381 I will hear it; otherwise I don't want his personal judgment.

"The Witness: I would have no way of giving the exact amount. I can say this, though, there would have been probably three or four or five engineers working constantly on this at Espey over a period of a year that I was familiar with."

Cardwell, the chief engineer of Parts Producing Corporation, testified that on numerous trips to Espey he had seen engineers working on 381 (223a-226a).

The district judge, however, took the position that, because petitioner had admitted changing records, there was no factual issue in the case as to the truth or falsity of the claim. The following colloquy sets forth the court's views (305a-307a):

> "The Court: No, I think your approach to this, or else mine, is entirely wrong. I don't see any factual question, because this defendant has said that substantially what the F.B.I. agent said was correct. By his own admission, he has submitted a wrong claim. He had said that he submitted a claim which he ordered the erasures on, involving forty-seven jobs that had no relationship whatsoever; the work he put in that claim was not done on this job; it was taken from forty-seven other jobs and put in there. Now, that in and of itself comes within the statute of submitting a false and fraudulent claim if the jury, laying it in the context of the whole, say that he did it wilfully and with intent to present a false claim. All this other thing that the Government has allowed to go in—I have long since reconciled myself to that attitude—if they say fit to have it go in, it just went in—I think is all irrelevant. I think it is immaterial. And you went ahead, without any objection being entered. But on that fact alone, on this own admission, there is no question left here except his mental state—none at all.
>
> "Mr. Kossman: If the Court please, I have probably not made it as clear to the Court as I have it in my mind. There was no admission to the F.B.I. agent at any time that there was a false claim made.

"The Court: Now, wait a minute. I am so sated with this. It is so obvious that I don't think it can even bear repetition by me. Here is a man who went out, went to forty-seven jobs, took them right out of the air and put them in a claim which he represented to the Government was the proper engineering cost of this contract.

"Mr. Kossman: That is right.

"The Court: He went out and he did it, and I say that the jury can say that that was a fraudulent claim, because he has not here in his own defense stated what ground he had. He lulled the Government into a sense of security by submitting that claim, that that work was done on that job. Why the Government did not hew to that line, I don't know, but that is in the record, and that is sufficient to take this case to the jury.

"Mr. Kossman: If the Court please—

"The Court: There is no question about that. I have yet to see a clearer case, on an admission by the man himself who says that it is substantially true. We have wasted a couple of days, in my judgment.

"Mr. Kossman: If the Court please, we gave the basis—

"The Court: I am not going to argue whether he is guilty or innocent. I won't do that. You can argue that. I am just saying that the man on his own admission said, 'I went out and took forty-seven jobs that had no bearing on this at all and I put it in this claim 381.'

"Mr Kossman: Because time was actually spent there.

"The Court: I don't care what time was spent. There may have been more time spent. We are not asking the reasonableness of the 2 or 3 per cent. It

may have been reasonable or fair, but he had no right, and the jury can so find that he did not have the right, to take work on forty-seven other jobs and put it in here and lead the Government to assume that that work was performed on this job.

"Mr. Kossman: He is not charged with that. He is charged with submitting a false claim. If there is no false claim in fact, there is no false claim.

"That is Point No. 1.

"The Court: That, he has admitted. He takes himself out of the realm of possibility; it is what he did."

The case was submitted to the jury on the same theory (317a-320a, 323a). In order not to lengthen the present petition unduly, the cited portions of the charge will not be printed.

As has been indicated, petitioner was found guilty, a motion for acquittal and/or new trial was denied, and on appeal the conviction was affirmed (*infra*, pp. A1, A2).

REASONS FOR GRANTING THE WRIT

Only occasionally, as in *Washington v. United States*, 357 U.S. 348; p. 331, J. Sup. Ct., Oct. T. 1957 (No. 1012, decided June 23, 1958), reversing 253 F. 2d 913 (C. A. 7), is this Court called upon to reverse a criminal conviction because of the insufficiency of the evidence. The present proceeding is another such case. It involves the prosecution of a corporate underling for an alleged false claim from which he could not and did not personally benefit, a prosecution frankly undertaken because he did not implicate his employers who successfully claimed their privilege (*infra*, pp. 22-

23). Apart from that, the absence of proof in the present record makes this a case that literally cries out for review.

First. There is no evidence in the present record that establishes the falsity of petitioner's representation in the third interim settlement proposal (GX8) that some $80,000 in direct engineering labor was actually expended on Job No. 381.

The prosecution proved that petitioner informally and unconventionally reconstructed what he believed to be the amount of direct engineering labor attributable to Job No. 381, and that he submitted this amount in the third interim settlement proposal which was forwarded to the Government. But the Government's proof never showed how much engineering labor in fact was expended on the job, and therefore never proved that the amount submitted in respect of engineering labor was, *in fact,* erroneous. The question is not, as the district judge assumed throughout, at the trial (216a-217a, 305a-307a; quoted *supra,* pp. 12-16) and in his charge to the jury (317a-320a, 323a), whether petitioner admitted constructing a statement to produce what he believed to be an accurate estimate of engineering costs. The question is whether his final total of such costs was true or false—and on that single, crucial issue, there was no proof.

Such decisions as there are on the point hold that technical inaccuracies do not amount to false claims (under the civil statute) in the absence of falsity in fact. *United States* v. *Park Motors,* 107 F. Supp. 168; *United States* v. *Beaty Chevrolet Co.,* 116 F. Supp. 810; both E. D. Tenn. In both of these cases, the bills were inaccurate, but in both it was held that the claim

was not false because the amount due from the Government was correctly set forth. Under that rationale, the present case presents an *a fortiori* situation in petitioner's favor, because here the Government never adduced independent proof of the figure for direct engineering labor.

Two analogies lend further support to petitioner's position.

In income tax cases, it is clear that "a conviction upon a charge of attempting to evade assessment of income taxes by the filing of a fraudulent return cannot stand in the absence of proof of a deficiency." *Lawn* v. *United States*, 355 U.S. 339, 361. Here Espey, petitioner's employer, eventually received more in the aggregate on its fourth settlement proposal (GX9) than the total sum petitioner had set forth in the third settlement proposal (GX8) in respect of which the present conviction was had. Just as there can be no income tax conviction in the absence of a deficiency, so, it is submitted, there can be no conviction for presenting a false claim when the government by paying more on a subsequent claim admits that the earlier one's inaccuracy harmed only the claimant.

Here the indictment charged petitioner with preparing a settlement proposal which "was false since said defendant knew well that the total amount due and owing to the Espey Manufacturing Company, Inc., on said settlement claim was substantially less than the amount claimed" (2a). Inasmuch as the Government eventually paid Espey more in the aggregate on the fourth settlement proposal (GX9), with a smaller figure for direct engineering costs, than on the third such proposal with the higher engineering figure that

petitioner had prepared, it is evident that the Government failed to prove the gist of its allegation.

It is true that the proposal prepared by petitioner, with its understatement of the aggregate sum due, and its alleged overstatement of one item, may have come within 18 U.S.C. § 1001 (*supra*, p. 3) if it was false in fact. But here the count laid under that provision was dismissed (1a, 312a, 313a), and the conviction now in question was had under the criminal false claims provision, 18 U.S.C. § 287 (*supra*, p. 2).

Another analogy is found in cases of perjury; there it is well settled that evidence of inconsistent statements made by a defendant under oath does not, without more, prove that one of them was perjurious. Cf. *United States* v. *Harris*, 311 U.S. 292; see *United States* v. *Nessanbaum*, 205 F. 2d 93, 95-96 (C. A. 3); *McWhorter* v. *United States*, 193 F. 2d 982, 983-984 (C. A. 5); *United States* v. *Buckner*, 118 F. 2d 468 (C. A. 2). In *United States* v. *Golan*, 24 F. Supp. 523 (E. D. Pa.), Judge Maris applied the same rule to the offense of submitting a false statement in an immigration proceeding. Identical reasoning requires that the offense of submitting a false claim be governed by a like rule.

On that footing, the proof fails: All that the Government showed was that Espey (GX3, GX9) and petitioner (GX5) had submitted documents that placed a different figure on the engineering costs. But this proof of inconsistent statements does not establish that one of the statements was false.

Here the trial judge not only assumed throughout that petitioner's frank admissions that he had attempted to reconstruct the actual engineering expenses incurred on Job No. 381 amounted to an admission

that he had prepared a false claim, but the court seriously impaired petitioner's efforts to establish the correctness of his conclusion by testimony as to the amount of engineering work actually performed. See pp. 14-16, *supra*. Thus the district judge not only shifted the burden of proof of falsity from the prosecution to the defense, he also prevented the defense from carrying the improperly shifted burden.

It follows that, in the face of the rulings at the trial, petitioner has not been able satisfactorily to establish the truth of his representations. But what is more significant here is that the Government made no effort, and so utterly failed, to establish their falsity.

Second. There is a second question in this case, which may be reached alternatively or secondarily. It is this, whether the interim settlement proposal prepared by petitioner was "any claim upon or against the United States" within 18 U.S.C. § 287. The court below (*infra*, p. A1) answered the question in the affirmative, citing *United States* v. *Cohn*, 270 U.S. 339, and *United States* v. *McNinch*, 356 U.S. 595.

In view of the present terms of 18 U.S.C. § 287, neither citation is pertinent. It is true that both the present criminal false claims statute, 18 U.S.C. § 287, and the present civil false claims statute, 31 U.S.C. § 231, were originally enacted as a single section, § 3 of the Act of March 2, 1863, c. 62, 12 Stat. 696, 698. The present civil provision, which was considered in *McNinch*, still contains the clause, "for payment or approval," and that clause was a part of the predecessor criminal statute, § 35 of the Criminal Code, that was construed in *Cohn*. But the latter provision was in 1948 separated into two sections of Title 18, §§ 287

and 1001, both omitting the clause "for payment or approval." Consequently the present settlement proposal is not a "claim" within 18 U.S.C. § 287, first because of the statutory changes, and second in the context of the present case, which plainly shows, on the Government's own evidence (32a), that it was only an interim proposal, subject to revision upwards or downwards. It may well have been the basis for a later claim, but it was not a claim within the narrow terms of 18 U.S.C. § 287.

The scope of the Government's current contract settlement activities, in the face of the changed statutory language, calls for review of this question—assuming it is reached—because of its obvious public importance.

Third. This is not a prosecution in which the Government can take pride.

1. The trial judge repeatedly expressed to the jury the view (317a, 318a, 320a, 323a) that petitioner's admission that he had attempted to reconstruct the engineering cards on Job No. 381 by altering cards and carrying them to an account numbered 381E amounted to a confession that petitioner had concocted a false claim. This was obviously erroneous; the critical issue, as has been pointed out, was the truth or falsity of the representation made, not the mode of its preparation.

2. The trial judge refused to charge as requested (No. 13, 330a) that "A wrongful purpose is an essential element of the offense of making a false representation or a false claim and if the defendant did not have a wrongful purpose in making a claim or representation, even if it is erroneous, your verdict must

be not guilty." That proposition was elementary, it was obviously correct, and refusal to charge even the substance of it was plain error.

3. Here are excerpts from the Government's argument in rebuttal (Tr. 519C, 519C-519D, 519F, 519I, 519L):

> "This is a young man, of course, who has worked hard in his life. He made a mistake. I have no question but what he repents. I have no question but that he is due some compassion, but that is not my function; that is not your function; that is Judge Ganey's function subsequent to a verdict of guilty, which is your function."
>
> * * * * *
>
> MR. FOGWELL [Assistant U. S. Attorney]: Well, sir, I do not wish to press the point, except that I think Mr. Kossman brought it up, seeing that the Pinskys* ought to be punished. I agree. I agree, and there is nothing we would rather do in this courthouse, but the only way we will ever be able to do it is through the cooperation of this defendant.
>
> "MR. KOSSMAN: I object to that, Your Honor.
>
> "THE COURT: No, it is competent.
>
> "MR. FOGWELL: That is the only way we will ever be able to punish the Pinskys. No. But as Mr. Kossman says they have put up an iron curtain; they have put a wall in front of the thing

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* The family name of the owners of Espey was "Pinsley". There is no mention in the testimony of "Pinskys." Inasmuch as the prosecutor himself called Nathan Pinsley as a Government witness (149a), it is difficult to believe that the references here and in subsequent portions of the summing up to "Pinskys" were inadvertent, and equally difficult to believe that the transposition of names was not calculated to prejudice petitioner. Cf. *Ross* v. *United States*, 180 F. 2d 160, 167-168 (C. A. 6).

as is their constitutional privilege. This is their constitutional privilege, laid down many years ago by the founders of this country.

"And this young man won't cooperate with the Government. He has told his story. All right, what happened to the rest of them?

"As I say, the Pinskys told him to do this thing, to erase these cards, and he should have taken the bull by the horns, and I suppose now he regrets it. He should have said, 'No; I quit this job. I will not do that.' But he didn't."

* * * * *

"The question of whether the Pinsleys, Pinskys, or anybody else were connected or not connected with it is not for you to decide. As Mr. Kossman has said, there is no evidence on the record that they have not been indicated, and I will tell you very honestly, I do not think they have been indicted. As a matter of fact, I feel very confident that they have not.

"There is also on the record the question of whether they will or won't, and that is not known either, but I would like nothing better than to indict them, every rotten one of them, every rotten one of them, and I don't care who they have for lawyers—ex-judges, Tom Dewey, anybody else—that means nothing."

* * * * *

"If I am a first offender I am due some compassion, but, of course, that is not the jury's function under our American system of justice today. That is the judge's function.

"MR. KOSSMAN: If the Court please, I wish he would not talk about 'compassion.' Compassion has no play in these things.

"THE COURT: Well, all right.

"MR. FOGWELL: It is still a crime, nonetheless. The fact that the Government did not pay out these sums of money which the defendant prepared these

forms for has nothing to do with it. The only question is, were they wrongfully prepared? Were they submitted to the Government? And was G-8, the famous G-8, a false and fraudulent statement?"

* * * * *

"It is of no moment at all—no moment at all—how much engineering was or was not done in this case. The only question, as I think Judge Ganey will tell you—the only question is, there really isn't any question, because the defendant admits that the statement was false that he sent in; he admits that the records weren't there; but it is of no moment as to how much engineering was or was not done."

4. Petitioner did not ask for a new trial below on any of these grounds, preferring to press for an outright judgment of acquittal. In those circumstances he is probably not free to raise them now. This Court, however—see Rule 40(d)(2) of the Revised Rules of 1954—is not thus limited. Accordingly these additional matters have been set forth, in order that it may be made apparent why the demands of justice require review of the present case.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

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